

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-20 23

To be argued by
JOSEPH W. HENNEBERRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
VICTOR MAYO,

Petitioner,

-against-

ROY BONDARD, Superintendent,
Green Haven Correctional Facility
at Stormville, New York,

Respondent.
-----X

BRIEF FOR RESPONDENT-APPELLEE

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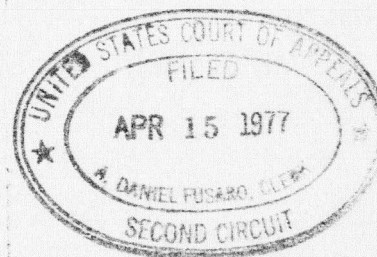


TABLE OF CONTENTS

	Page
Questions Presented.....	1
Statement.....	1
Facts.....	2
A. Prior State Proceedings.....	2
B. Prior Federal Proceedings.....	3
C. The Evidentiary Hearing In The Prior Application for Habeas Corpus Relief.....	5
D. Proceeding In The District Court.....	24
POINT I - PETITIONER WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.....	25
POINT II - PETITIONER HAS NOT BEEN DENIED DUE PROCESS UNDER <u>PATE</u> v. <u>ROBINSON</u>	33
POINT III - THE FAILURE OF THE TRIAL COURT TO CONDUCT A COMPETENCY HEARING IN 1960 DOES NOT ENTITLE PETITIONER TO FEDERAL RELIEF, IN VIEW OF THE FACT THAT PETITIONER WAS SUBSEQUENTLY AFFORDED A CORAM NOBIS HEARING BY THE STATE COURT, AND A FULL EVIDENTIARY HEARING BY THE DISTRICT COURT IN A PRIOR APPLICATION FOR HABEAS CORPUS RELIEF.....	34
Conclusion.....	39

TABLE OF CASES

	Page
<u>Brubaker v. Dickson</u> , 310 F. 2d 30 (9th Cir. 1962), <u>cert. den.</u> 372 U.S. 978 (1963).....	30
<u>Bruce v. United States</u> , 379 F. 2d 113 (D.C. Cir. 1967).....	32
<u>Dusky v. United States</u> , 362 U.S. 402 (1960).....	3, 33
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938).....	33
<u>Nathaniel v. Estelle</u> , 493 F. 2d 794 (5th Cir., 1974).....	37
<u>Pate v. Robinson</u> , 383 U.S. 375 (1966).....	4, 30, 35
<u>People v. Bangert</u> , 22 N Y 2d 799 (1968).....	4, 38
<u>People v. Hudson</u> , 19 N Y 2d 137 (1967), <u>cert. den.</u> 398 U.S. 944 (1970).....	4, 35, 38
<u>People v. Mayo</u> , 32 App. Div. 2d 893.....	3
<u>People v. Mayo</u> , 41 App. Div. 2d 903.....	3
<u>Procunier v. Atchley</u> , 400 U.S. 446 (1971).....	37
<u>United States v. Adams</u> , 297 F. Supp. 596 (S.D.N.Y. 1969).....	33
<u>United States v. Garguilo</u> , 324 F. 2d 795 (2d Cir. 1963).....	31, 32
<u>United States v. Katz</u> , 425 F. 2d 928 (2d Cir. 1970).....	31, 32
<u>United States v. Kendrick</u> , 331 F. 2d 110 (4th Cir. 1964).....	27

TALLE OF CASES (con't)

	Page
<u>United States v. Wight</u> , 176 F. 2d 376 (2d Cir. 1949), <u>cert.den.</u> 338 U.S. 950 (1950).....	31
<u>United States v. Yanishefsky</u> , 500 F. 2d 1327 (2d Cir. 1974).....	25
<u>United States ex rel. Jones v. Vincent</u> , 491 F. 2d 1275 (2d Cir., 1974), <u>cert. den.</u> 419 U.S. 877.....	25
<u>United States ex rel. King v. Schublin</u> , 522 F. 2d 527 (2d Cir., 1975), <u>cert. den.</u> 423 U.S. 990 (1976).....	25
<u>United States ex rel. Maselli v. Reincke</u> , 383 F. 2d 129 (2d Cir., 1967).....	31
<u>United States ex rel. Schuster v. Herold</u> , 410 F. 2d 1071 (2d Cir., 1969), <u>cert.</u> <u>den.</u> 396 U.S. 847 (1969).....	33, 37
<u>United States ex rel. Scott v. Mancusi</u> , 429 F. 2d 104 (2d Cir., 1970), <u>cert. den.</u> 402 U.S. 909 (1971).....	31
<u>United States ex rel. Testamark v. Vincent</u> , 496 F. 2d 641 (2d Cir., 1974), <u>cert. den.</u> 95 Sup. Ct. 1685 (1975).....	25

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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VICTOR MAYO, :

Petitioner, :

-against- :

ROY BOMBARD, Superintendent, : Docket No. 77-2023
Green Haven Correctional Facility :
at Stormville, New York, :

Respondent. :

-----X

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Was the petitioner denied due process when no inquiry was made at the time of his trial into his competence to stand trial?

2. Was the petitioner denied effective assistance of counsel in his 1960 trial?

Statement

This is an appeal from a memorandum and order of the United States District Court for the Southern District

of New York (Cannella, J.) dated January 5, 1977 denying petitioner's application for a writ of habeas corpus.

Facts

A. Prior State Proceedings

Petitioner's application sought to set aside a predicate felony conviction for robbery, assault and petit larceny, which was imposed on him by the County Court of Kings County (Darshay, J.), on September 13, 1960. As a result of this conviction, petitioner received an enhanced sentence when he was convicted of manslaughter in 1966 by the Supreme Court, New York County. Petitioner is currently on parole from this sentence.

In 1967 petitioner commenced a coram nobis proceeding in the Kings County Supreme Court, raising the issue that he was incompetent to stand trial in 1960. Justice Barshay disqualified himself under New York law, and Justice Damiani conducted an evidentiary hearing. On December 4, 1967 Justice Damiani denied coram nobis relief on the ground that pertinent medical and psychiatric proof had not been submitted on petitioner's behalf. Justice Damiani's decision was affirmed

without opinion by the Appellate Division in 1969 (32 App. Div. 2d 893), and leave to appeal was denied by the New York Court of Appeals.

Petitioner, in 1971, was resentenced on his 1960 conviction after a finding that he had not been advised of his right to appeal. Petitioner then appealed this conviction. The conviction was affirmed without opinion by the Appellate Division (41 App. Div. 2d 903, 342 N.Y.S. 2d 828) and leave to appeal to the Court of Appeals was denied.

B. Prior Federal Proceedings

On December 3, 1969, petitioner filed a habeas corpus application in the Eastern District of New York. On May 26, 1970, the case was transferred to the Southern District of New York (70 Civ. 2202). On January 17, 1972, the District Court (Lasker, J.) conducted an evidentiary hearing, and on December 6, 1972 rendered a decision denying petitioner's application. The District Court held that the petitioner had not proven by a preponderance of the evidence that he was incompetent to stand trial within the meaning of Dusky v. United States, 362 U.S. 402 (1960), and that

petitioner's silence about his mental condition in 1960 did not vitiate the contemporaneous evidence which indicated that petitioner had a "present ability" to consult with his attorney and to understand the proceedings in the state court (A 243-261).*

Petitioner moved for reargument in the District Court. Petitioner advised the Court, in response to an inquiry by Judge Lasker, that under New York law the trial judge was bound to have made some inquiry into petitioner's mental state in 1960, as a result of retroactive application of Pate v. Robinson, 383 U.S. 375 (1966). The State conceded that such an inquiry was necessary under the New York Court of Appeals decisions in People v. Bangert, 22 N Y 2d 799, 239 N.E. 2d 644 (1968), and People v. Hudson, 19 N Y 2d 137, 227 N.E. 2d 193 (1967), cert. denied 398 U.S. 944 (1970), but contended that the proper remedy had been afforded to petitioner by the state courts in granting him a coram nobis hearing on competency in 1967 (A 269-270). Petitioner rejoined that the hearing granted was not a full and fair hearing.

*Letter A followed by number refers to page numbers in Appendix.

On August 23, 1973, the District Court denied petitioner's motion to vacate or amend the prior decision denying the writ. The District Court held that petitioner had not disproved the major premises of the prior decision, but merely disagreed with them; and that petitioner had not demonstrated that the District Court's findings were unsupported by the record. With respect to the issue of state law that was raised by petitioner during reargument, the District Court held that a resolution of that issue was not necessary because petitioner had been afforded a full and fair hearing in federal court, thus "curing" the alleged defect in the state court proceedings (A 263-267).

On March 19, 1974, this Court affirmed the decisions of the District Court without opinion. Certiorari was denied by the United States Supreme Court.

C. The Evidentiary Hearing In The Prior Application For Habeas Corpus Relief

At the evidentiary hearing before Judge Lasker on January 17, 1972 (A 102-227), the following facts were developed which are relevant to this appeal.

Michael Washor, petitioner's trial counsel, said he had no recollection of representing petitioner in 1960 (A. 115). He said he had been practicing law only four or five months at the time of petitioner's trial (A. 115). Based on his review of the sentencing minutes and other materials, Washor recollected that he was impressed with petitioner's quietness, that there was a lack of complete communication between himself and petitioner, and that their conversations were at a minimum (A. 117).

Washor did recall having discussions with petitioner about disposing of his case by plea, and Washor was sure that he at least conveyed to petitioner that the Court would determine the jail sentence and the time that petitioner would have to serve in prison (A. 119). Washor said he did not discuss the moral aspects of petitioner's crime and did not ascertain whether or not petitioner understood the severity of his moral conduct as opposed to the time he would spend in jail (A. 120). He said that petitioner's awareness of the severity of his crime was "probably" restricted to his awareness of the length of sentence that could be imposed (A. 121).

Washor stated that he saw petitioner anywhere from three to six times in 1960, either in the house of detention or in the bull pen (A. 122, 123). He said he had no independent recollection of his conferences with petitioner, but thought they were probably of ten to fifteen minute duration (A. 124). He said he had no knowledge of petitioner's attempted suicide or the possibility of petitioner suffering from epilepsy or petitioner having suffered from chronic brain syndrome, but he did learn from petitioner's mother on the day of sentence that petitioner had been confined to a state mental hospital (A. 124-125). He said he did not know that petitioner was receiving psychiatric treatment on aftercare status (A. 126-127).

Washor further stated that if he had known of various aspects of petitioner's mental history, he would have communicated that fact to the court and requested a psychiatric examination (A. 127).

On cross-examination, Washor acknowledged that in 1960 he was practicing law with his father, an attorney who possessed a good deal of experience (A. 128). Washor said that he probably would have discussed every aspect of petitioner's case with his father, as he does today (A. 128).

Washor said he did not have any independent recollection of petitioner testifying at the 1960 trial, however upon being reminded that petitioner did so testify, Washor stated that under "normal conditions" he would have discussed this with petitioner (A. 129-130). Washor said that because a guilty plea was being discussed with the prosecution, his discussions with petitioner would not have been in the "constitutional area", but more in the area of petitioner telling the truth when he testified (A. 131).

When reminded of his statement at sentencing that petitioner "hopes and does have an opportunity to have the same job that he had prior to being apprehended", Washor stated that he could not recall whether he got this information from petitioner, petitioner's mother or the probation report (A. 131).

Petitioner testified on his own behalf. He said he remembered his trial before Justice Barshay in 1960, and said that Mannie Campbell was with him when he robbed the store (A. 135). He said that in 1960 he did not know the purpose of a criminal trial and did not know that a trial should not have been held if he did not know what the trial was all

about (A. 136). He said he did not know that a criminal trial was not supposed to lead to the punishment of someone who was not legally responsible for the acts he was accused of committing, and he did not know that if he told his attorney about his mental history and prior experiences, this would help his attorney decide how to prepare for trial (A. 137). He said he did not know if he conveyed this information to the judge, it would help the judge decide what to do with him after the trial was over (A. 138).

Petitioner also stated that he did not tell his lawyer about his having been in institutions until the age of eleven, about his experiences and many years in two state mental hospitals, and about his outpatient status at the Brooklyn Aftercare Clinic (A. 138-139).

On cross-examination, petitioner stated that he remembered testifying at his 1960 trial, remembered taking the witness stand and explaining his story to the judge, and remembered talking to his lawyer about what he would say on the witness stand (A. 139). Petitioner said that he understood that he might go to jail, that he thought he had committed a crime, and that he remembered telling the judge

in court about the robbery (A. 141).

Dr. Richard Sallick, a Diplomate in Psychiatry and Neurology, and the Director of the outpatient clinic at New York Hospital, testified on petitioner's behalf.

Dr. Sallick said that petitioner's I.Q. of 80, which was ascertained in 1951, placed petitioner in the "dull normal" range (A. 147). He said that persons in that range are defined by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, as having a mental deficiency (A. 148). He said that the 70-85 I.Q. range is termed "mild impairment", and persons in this category are considered educable to support and care for themselves, to a limited extent (A. 149). Sallick noted the emphasis in childhood reports on petitioner's tendency to be withdrawn, a difficulty in communicating with petitioner and his tendency not to assert himself (A. 151). He said the term "flatness" which had been used in the reports to characterize petitioner's behavior, connoted a state of withdrawal or neutrality, where one has little sense of what emotion is going on in the other person (A. 151-152).

In answer to a question by the court whether petitioner's background could have affected his mental function as well as his emotional behavior, Dr. Sallick stated that he did not think anyone could make a clear case here whether there were two or one etiology (A. 153).

Sallick testified that a 1953 report by a Dr. Piana showed a further deterioration of petitioner's mental condition (A. 155). He said the report spoke of a permanent form of ego rupture, which meant that petitioner's ego was broken and could not develop properly, but the report also noted that there was no overt psychosis as manifested by delusional material or by hallucinations (A. 156-158). Sallick said that a person with a broken ego might be able to promote his own interests or assist himself in times of difficulty, but could not do so consistently and would be lacking in this regard (A. 158-159).

Sallick said that the description of petitioner in the 1953 report was adequate to support a conclusion that petitioner had suffered a convulsive seizure, but he could not say whether epilepsy was the cause of it (A. 159). Sallick said he did not think that epilepsy was necessarily

associated with intellectual deterioration and impairment of judgment (A. 160).

Sallick was questioned about the diagnosis of petitioner as suffering from "childhood schizophrenia, hebephrenic tendencies", and he said that this was a severe prognosis which was not likely outgrown (A. 162-163). He said that petitioner's childhood schizophrenia would have affected his ability seven years later to consult with an attorney, because he would not communicate freely with people, and would tend to be passive and withdrawn (A. 163-164). Sallick said that it might have occurred to petitioner to have communicated facts to his attorney which might have helped him, but his tendency to be passive and withdrawn would have held him back from doing so (A. 164).

Sallick further testified that the diagnosis of petitioner in 1961 as having schizoid personality (which diagnosis was made by a prison psychiatrist shortly after petitioner was convicted in 1960), meant that petitioner was a withdrawn, passive person, who exhibited little emotion and had difficulty relating to people and handling aggressive feelings (A. 169). Sallick said that he would have made the

same diagnosis at that point, without more intensive evaluation or psychological reports being available (A. 170). He said that the diagnosis of childhood schizophrenia was more "ominous" than the diagnosis of a schizoid personality, because schizophrenia described the likelihood of total withdrawal and psychosis, whereas schizoid is more on the surface and means that a person lives this kind of life pattern (A. 170). He said a person who at one time had a schizophrenic diagnosis would appear during a period of relative stability as a schizoid person (A. 171).

Sallick said that petitioner's schizoid condition would have existed four to nine months previous to the diagnosis in 1961, and that it would have affected petitioner's ability to consult with a lawyer because petitioner would have been a difficult person to communicate with, to explain things to and to obtain cooperation from (A. 174-175). He said that based on the available information about petitioner which he had reviewed, it was his opinion that in September, 1960, petitioner lacked a rational understanding of the criminal proceedings against him in the sense that petitioner could not understand the whole picture of the whole situation, and could not take into account what the alternatives were

and what he could do in his own interest (A. 175-176).

On cross-examination, Sallick testified that a person with an I.Q. in the 70 to 85 range was educable to the extent that he could take care of himself, hold a simple job, and learn to read and write (A. 177). He said that such a person was considered to be in the dull-normal, retarded range (A. 177). In answer to a question about the validity of an I.Q. test administered to a child of eight years, Sallick said that any I.Q. scores have to be taken with more than a grain of salt (A. 178).

Sallick said that a diagnosis of emotionally flat response could have something to do with a person's intelligence or level of comprehension, but emotional flatness was not necessarily an accompanying characteristic of low dull intelligence (A. 179-180). He said that during a period of stability a person with a schizophrenic illness could very often maintain a fairly reasonable and level pattern of behavior, but if some additional stress was added, symptoms would appear (A. 180). He said there would be some variance in the person's ability to comprehend depending on whether the person was undergoing a period of stability or instability (A. 180).

Sallick said that a person suffering from childhood schizophrenia or a schizoid personality would have enough mental presence and enough understanding of what was going on to take the witness stand in a criminal proceeding and to know grossly what was happening (A. 181). He said such a person would be capable of understanding and answering questions and would be capable of discussing his situation with a probation officer and carry on a reasonable conversation about simple things (A. 181).

Sallick said that during a period of apparent normalcy petitioner would still have been limited by his inherent personality limitations, and would have been lacking in personal initiative (A. 182). However, petitioner would have understood facts and in all likelihood, would have given logical responses (A. 182).

Gerald P. Hecht, a supervising probation officer of Kings County, testified on behalf of the State. He said he possessed more than seventeen years of continuous experience and had worked in virtually every aspect of the probation field (A. 184-185). He said he was familiar with the work of Edwin Levy, the probation officer who handled petitioner's

case in 1960 (A. 185-186).

Hecht said that as far as he could remember, probation officers were directed to pay special attention to mental competency or any unusual behavior which might be suggested as a basis for further competent psychiatric evaluation (A. 187-188). He said that the 1960 Manual for Probation Officers required that physical or mental disabilities of a defendant should be stated in a probation report (A. 188-189). He said that it was normal procedure for probation officers to include in their reports a description of the social background and mental history of the defendant (A. 189-190).

Hecht said that if a defendant exhibited some form of aberration or inability to comprehend, this fact would be noted by the probation officer in the probation report (A. 190). Hecht said that he had examined petitioner's 1960 probation report and based upon his examination of this report and his experience as a probation officer and his familiarity with Officer Levy's work, he was of the opinion that Levy would have noted in his written report that petitioner was acting in an aberrational way or incapable

of understanding his questions or incapable of communicating with him (A. 191).

Hecht said that he did not know the number of times Levy met with petitioner, but usually a probation officer would meet with a defendant on one occasion for about an hour (A. 197). He said that petitioner's report did not contain a recommendation of a psychiatrist, as suggested by the field officer's manual, but he said that he believed the guidelines in the manual were complied with by obtaining information from an aftercare unit of a state mental hospital (A. 199-200).

Albert DeMeo, a Professor of Law and a former Kings County prosecutor, testified on behalf of the State. He said that he handled thousands of felony cases in his many years as a federal and state prosecutor, and was familiar with the provisions of New York law governing psychiatric examination (A. 202-203). He said he had no independent recollection of handling petitioner's 1960 trial, but he had studied the official file of the District Attorney's office (A. 203-204).

DeMeo said that based on his many years of experience as a prosecutor, if a defendant at a trial exhibited any indication that he did not understand the nature of the proceedings or could not consult properly with his attorney, DeMeo would have asked the court to order a psychiatric examination for such a defendant (A. 206). DeMeo further stated that based upon his review of the trial records, there was nothing to indicate that the defendant ever exhibited any such behavior as would have triggered an examination (A. 208).

On cross-examination, DeMeo acknowledged that in 1960 he had no awareness of petitioner having attempted suicide or having possibly suffered from epilepsy or having been diagnosed as a childhood schizophrenic with hebephrenic tendencies or having been confined in mental hospitals; and he said that he would have regarded these things as relevant to petitioner's mental competency if he had known about them (A. 210-212).

DeMeo further testified that based on his examination of the trial minutes, there was no indication during his cross-examination of petitioner that petitioner was not understanding the questions that were put to him (A. 213).

Respondent also introduced an official record of the Supreme Court, New York County pertaining to petitioner's second conviction in 1966 for manslaughter in the first degree. The record notes that petitioner was committed for a psychiatric examination in 1965 and found to be not psychotic.

Petitioner called Mrs. Harriet Walit as a rebuttal witness. She testified that she was employed by the Brooklyn Aftercare Clinic in 1960, and had occasion at that time to meet with petitioner (A. 215-216). She said that petitioner had sporadic contacts with the clinic from January, 1959 to March 21, 1960 (the last visit before his arrest), and that he was absent for a ten month period (A. 217-218). She said he was healthy enough to be considered for discharge, but no decision had been reached (A. 221).

On cross-examination, Walit said there were two things apparent from her review of her 1960 notes about petitioner: there were indications of adjustment and then at times, there were indications of some difficulty in the community (A. 223). She also noted the ten month lapse of time since his previous visit, and the fact that a doctor

did request a return appointment with petitioner (A. 223). She said that after reading her report, there was no reason to believe that petitioner did not understand what was going on at her interview with him (A. 225).

Walit acknowledged that she had written in her report: "The patient understands that he will receive a discharge appointment with the doctor as soon as there is a Thursday evening appointment available and that he can contact this clinic any time before this". (A. 225) Walit said that she had written this statement on the basis of a conversation she had with petitioner and had no reason to believe that petitioner did not understand what she said (A. 225).

In a stipulation between the parties which was admitted in evidence at the hearing, there is contained a 1960 probation report of Edwin Levy concerning petitioner (A. 272-277). The following are salient portions of Levy's report:

"D. Defendant's statement to Probation Officer: Defendant Mayo says he spent the early part of the day, Saturday, his day off, drinking with a number of acquaintances. About 4 P.M. he went to the place of

employment of Campbell and waited until the latter finished with work. Then the two made a round of bars and grills. They were on Knickerbocker Avenue when he decided to go into the complainant's candy store for cigarettes. . . Mayo goes on to state that when he entered the store he saw no one inside and walked behind the counter and was surprised when he saw the complainant seated there, not having been able to see her from the customer's side of the counter. It was his intention to take some cigarettes and perhaps some money from the cash register if no one was in the store. However, when he saw the complainant, he was scared himself and thought it best to try to scare the complainant by simulating the possession of a revolver. It was there and then he decided to go through the act as if he were committing a holdup. He insists he did not plan it. . .

* * *

F. Mitigating and Aggravating Circumstances: The defendant Mayo admits commission of the crime, and claims that the defendant Campbell had nothing to do with it. Campbell declares he had nothing to do with the crime. . . The statements of both defendants are belied by information supplied by the complainant. . .

The defendant Mayo has a history of mental illness, having been at one time confined at Rockland State Hospital. There were no manifestations

of erratic behavior up to the time of his crime.

* * *

C. Youth and Adult History:

1. Employment Record: When he came out of Kings Park State Hospital at the beginning of 1959, he worked for several months in the auto wrecking yard, Jimmy's Auto Wreckers, 66 Scott Avenue as a general laborer. It was not steady work and he merely filled in when the firm was busy. He then left this in order to go to work for the Atom Blower Company. . . Here he did air conditioning work, assisting by doing the menial aspects of the work of more experienced air conditioning people. He earned \$70.00 per week and was still employed at the time of his arrest. It is noteworthy that he obtained this job through his mother's brother-in-law who owns the firm.

* * *

3. Character, Habits and Associates: The defendant is an 18 year old white youth, 5'8" tall weighing 150 pounds. He is thin, anaemic and emaciated appearing. He makes a rather dull impression but seems to understand the implications of his offense and could discuss it with some degree of intelligence, although appearing almost indifferent. . .

The defendant's emotional flatness has been a characteristic since childhood. Yet he verbalized that he regrets the offense and does not know why he did it. . .

As a hobby, the defendant developed an interest in making airplanes. He buys kits of balsa wood and follows the instructions. He has never given much thought to a future occupation but thought that he likes air conditioning, the field in which he is presently employed, and thought that eventually might become a technician. Apparently, he is not aware that people who earn the higher salaries in this field are trained technicians with somewhat of a technical background. . .

D. Mental and Physical Health History:
There is no I.Q. Rating available but the fact that he had been in upgraded classes at the Astor Home, would indicate that he was below normal intelligence. He was committed to Rockland State Hospital in August, 1953 as a psychopathic personality with possible brain damage. Presumably, the suspicion of brain damage is based on an Astor Home psychiatrist report to the effect that the EEG was abnormal. When released from the hospital 1/10/59 he was placed under the supervision of the after care division. The Social Worker, Miss Thulin (Mrs. Walit), indicates that the defendant's progress was considered as good up until the time of his crime arrest. The After Care division was even considering his discharge". (A. 29, 30, 32, 33).

The Levy report also contains references to petitioner's institutionalization as a child, and notes his emotional and mental problems.

Based on the foregoing evidence, as well as other evidence before him, Judge Lasker rejected petitioner's claim that he was not competent to stand trial in 1960.

D. Proceeding In The District Court

In the instant application for a writ of habeas corpus, petitioner argues that he was denied due process when the state court failed to hold a hearing sua sponte as to his competency to stand trial. The District Court in its decision of January 6, 1977 found that in light of the circumstances of this case, it could not conclude that the trial judge was under an obligation to hold a hearing to determine competency absent a request to do so. Petitioner's demeanor at trial was such that the need for questioning his competency never arose.

Petitioner also argues that he was deprived of effective assistance of counsel because his attorney failed to ask routine background questions about material matters

and failed to investigate petitioner's history of mental illness disclosed at the time of sentencing. The District Court found that there was no denial of effective assistance of counsel but rather found that the attorney's handling of the trial was consistent with petitioner's original intention to plead guilty in the hope of getting a more lenient sentence.

POINT I

PETITIONER WAS NOT DEPRIVED OF
THE EFFECTIVE ASSISTANCE OF
COUNSEL

Petitioner carries a heavy burden of showing that his representation was "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice". The Second Circuit continues to adhere to this standard. United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974); United States ex rel. King v. Schubert, 522 F. 2d 527 (2d Cir. 1975) cert. den. 423 U.S. 990 (1976); United States ex rel. Testamark v. Vincent, 496 F. 2d 641 (2d Cir. 1974) cert. den. 95 S. Ct. 1685 (1975); United States ex rel. Jones v. Vincent, 491 F. 2d 1275 (2d Cir. 1974) cert. den. 419 U.S. 877. Petitioner has not met his burden.

First of all it should be noted that the petitioner's attorney was not aware of the mental history until the time of sentence. This was pointed out by Judge Lasker in his opinion after a full evidentiary hearing on the first application for a writ of habeas corpus:

"Moreover, petitioner's attorney noticed no difficulty in his client's understanding. Petitioner did consult with counsel on several issues including possible disposition of the charges by a guilty plea. It was not until sentencing that petitioner's lawyer learned of his client's record of institutionalizations and mental history. He stated for the record that petitioner has been committed by his family to Rockland State Hospital and testified that he learned this fact either from petitioner's mother or the Court through the Probation Report (Tr. at 24-25). He stated also that having been admitted to practice only a few months at the time of the trial, he did not have the trial experience to make a routine check of petitioner's mental history in hopes of turning up some evidence which might be used in petitioner's defense. Despite his newness to practice, petitioner's lawyer did discuss the case with his father, an experienced attorney." (A. 252).

Judge Lasker further stated:

"It was up to his lawyer to explore the defense and his lawyer saw no basis to press a mental defense. The crime

indicated no evidence of mental aberration and the evidence at trial raised none of the 'bona fide doubt' which would require the court to hold a competency inquiry under Pate v. Robinson, 383 U.S. 375 (383)(1966). (A. 257) Moreover, as was stated in United States v. Kendrick, 331 F. 2d 110 (116 Concurrence of Chief Judge Soberloff) (4th Cir. 1964).

If a lawyer fails to recognize his client's mental deficiencies, no fairminded person would say that this necessarily involves faithlessness or negligence. It cannot be expected that the lawyer, who is a layman in psychiatric matters, will always appreciate his client's mental limitations."

Although the attorney stated that he did not feel at that time he had sufficient experience to deal with the subject of mental illness, this issue becomes irrelevant when you consider that at the trial, petitioner evidenced no signs of incompetence apparent to the Judge and Prosecutor as well as his own attorney.

As Judge Lasker stated "Petitioner's demeanor at trial and thereafter was such that the need for questioning his competency never arose." (A. 250-251).

It is clear that the trial counsel was not aware of the possible defense of insanity prior to or during the trial. It is also clear in the light of Judge Lasker's opinion that the attorney's failure to discover past institutionalization was not a dereliction resulting in denial of effective assistance of counsel.

When the attorney finally did become aware of his client's mental history at sentencing, he effectively used this in his statement to the court upon sentence to argue mitigating circumstances (A. 96-97).

In considering petitioner's further claims of denial of effective assistance of counsel, one main point should be kept in mind. It is apparent from a reading of the trial and sentencing minutes that it was petitioner's intention all along to plead guilty and request leniency from the court. This is evident from the sentencing minutes (A. 96-97), and in and of itself is a tactic worthy of an able defense attorney. However, because of a situation beyond his control, the fact that the prosecutor would not sever the petitioner's case from that of his co-defendant, petitioner voluntarily waived a jury and proceeded to trial.

Petitioner also states that his trial was not an adversary proceeding and that his willingness to testify, admit his crime and attempt to exculpate his co-defendant, was not a rational and free decision but rather the result of mental illness. Again it must be emphasized that neither the court, the prosecutor nor the attorney were aware of any mental problems on the part of the petitioner. Petitioner's arguments can be easily turned around and stated that it is a rational act to cooperate and hope for leniency. It is also a normal human reaction not to reveal any mental problem in one's background since it is usually considered embarrassing.

Trial counsel secured for his client at sentencing a short prison sentence. It is not a rational act to want to go to jail or be institutionalized for a long period of time. If, upon learning of petitioner's mental history at sentence, trial counsel had sought a post-conviction remedy, and was successful in overturning the verdict by reason of petitioner's insanity, there was the possibility that petitioner would be institutionalized under a civil commitment. Counsel had already secured a short prison sentence for his client. It should be kept in mind that trial counsel in 1960 could not

foresee future developments in case law. Pate v. Robinson, supra was not decided until 1966.

One case relied upon by petitioner in his brief, Brubaker v. Dickson, 310 F. 2d 30 (9th Cir., 1962), cert. den. 372 U.S. 978 (1963) should be distinguished from the instant case. Brubaker involved a petitioner who had been convicted of murder and sentenced to death.

In Brubaker, the only evidence that connected the petitioner to a homicide was a statement he made to the police. His trial counsel did not investigate the circumstances of this statement. Petitioner also claimed to have a mental history that his trial counsel did not investigate and use for his benefit. However, the trial counsel there was aware prior to trial of petitioner's history of head injuries and unconsciousness.

In the instant case, there was more evidence connecting the petitioner to the charges than an admission. Petitioner's trial attorney was not aware of any circumstances that would lead him to suspect a mental problem. Practically speaking, it is the exception rather than the rule that an

insanity defense would be raised at a robbery trial. This defense is common in matter of homicide.

The standards for establishing inadequacy of counsel in this Circuit are well-established:

"Errorless counsel is not required...[B]efore we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'"

United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963) (emphasis supplied). See also United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 109 (2d Cir. 1970) cert.den. 402 U.S. 909 (1971); United States v. Wight, 176 F. 2d 376, 379 (2d Cir. 1949), cert. den. 338 U.S. 950 (1950). The fact that "the case could have been better tried" is not a reason to sustain such a claim. United States v. Katz, 425 F. 2d 928, 931 (2d Cir. 1970).

As this Court said in United States ex rel. Maselli v. Reincke, 383 F. 2d 129, 133 n. 4 (2d Cir. 1967):

"[A] defendant's constitutional right to fundamental fairness is not violated when, looking back upon the events occurring at a trial, one can perceive ways in

which the trial representation could have been bettered and some errors or mistakes avoided. Fundamental fairness is denied only in extreme situations and then only when the defendant is obviously prejudiced thereby." (Emphasis added).

This is hardly a case in which "gross incompetence blotted out the essence of a substantial defense" (Bruce v. United States, 379 F. 2d 113 [D.C. Cir. 1967]).

Petitioner's trial attorney acted in his client's best interest at the time of the trial, considering the strength of the people's case. Given this kind of case there is "not too much the best defense attorney can do." United States v. Katz, 425 F. 2d 928, 930 (2d Cir. 1970). There was certainly no "total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963).

POINT II

PETITIONER HAS NOT BEEN DENIED
DUE PROCESS UNDER PATE V. ROBINSON.

As Judge Lasker stated (A 253):

"The test of petitioner's competence in 1960 is 'whether he [had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, of the proceedings.' Dusky v. United States, 362, U.S. 402 (1960). Petitioner has the burden of establishing that he did not. Johnson v. Zerbst, 304 U.S. 458, 468-9 (1938); United States ex rel Schuster v. Herold, 410 F 2d 1071, 1085 (2d Cir. 1969); cert. denied 396 U.S. 847 (1969).

"The fact of petitioner's uncontested mental illness and limited intelligence does not automatically render him incompetent to stand trial. United States v. Adams, 297 F. Supp. 596, 597 (S.D.N.Y. 1969). We must weigh the facts of record to decide whether petitioner's ability to consult with his attorney and his rational understanding of the charges and proceedings were sufficient.

"Although it is alarming that a man of petitioner's mental and physical problems should go through an entire criminal trial without his difficulties even once being noticed, we cannot say that petitioner has clearly met his burden under law on this application. He did choose to go to trial and chose to testify; he understood that he could plead guilty and that jail was a likely punishment if he was convicted. Although

his waiver of a jury trial was not explored fully in the proceedings here, he did waive that right and does not appear to challenge that waiver now."

The court and the state were not aware of the mental history of the petitioner until a probation report was prepared. It is not apparent from this report that petitioner does not meet the Dusky test, especially in view of his apparently normal conduct at trial. The report certainly indicates that petitioner was capable of understanding what was happening to him and capable of communicating with people who dealt with him at the time. In light of the above, Judge Carmella found that the trial judge was not under an obligation to order a competency hearing absent a request to do so.

POINT III

THE FAILURE OF THE TRIAL COURT TO CONDUCT A COMPETENCY HEARING IN 1960 DOES NOT ENTITLE PETITIONER TO FEDERAL RELIEF, IN VIEW OF THE FACT THAT PETITIONER WAS SUBSEQUENTLY AFFORDED A CORAM NOBIS HEARING BY THE STATE COURT, AND A FULL EVIDENTIARY HEARING BY THE DISTRICT COURT IN A PRIOR APPLICATION FOR HABEAS CORPUS RELIEF.

Petitioner argued on his appeal of Judge Lasker's decision to the Second Circuit that in view of the failure

of the state court to conduct a competency hearing in 1960, the District Court should have granted the writ and given the State an opportunity to retry petitioner, rather than conduct a competency hearing on its own. Petitioner relied heavily on the State's concession that petitioner was entitled to a retroactive application of Pate v. Robinson, 183 U.S. 375 (1966), under the decision of the New York Court of Appeals in People v. Hudson, 19 N Y 2d 136 (1967). This is exactly what the petitioner is again submitting to the federal courts.

However, as the State further pointed out in its post-hearing, post-decision letter to Judge Lasker, the defect in the state court procedure, which resulted from the retroactive application of the Supreme Court's 1966 decision to petitioner's 1960 trial, was remedied by the coram nobis hearing that was afforded to petitioner in 1967 on the issues of competency. While this hearing was found by the District Court not to have been sufficiently full and fair to obviate the need for a federal hearing, this was not the fault of the state court, but the fault of petitioner's then attorney who failed to produce pertinent psychiatric and medical evidence to support petitioner's claim. The state court did not inhibit petitioner in presenting any evidence he might have wished to produce in support of his coram nobis application, and the marked disparity

between the evidence produced at the hearing and the evidence produced below, compels the conclusion that the lack of fullness of the state court hearing was due to petitioner's counsel.

Furthermore, as Judge Lasker correctly noted whatever defects there were in the state court hearing were "cured" by his own thorough hearing, in which he gave petitioner every opportunity to establish that he was not competent to stand trial in 1960. It is significant, that prior to receiving an adverse decision from the District Court, petitioner contended that the issue of competency could be determined retroactively by the District Court. In addition petitioner did not maintain at that time that the District Court should have granted the writ merely because of the error in state procedure, but only that the writ should have been granted because the evidence was in his favor.

Petitioner also contends that he unfairly bore the burden of proof of his habeas corpus hearing in the federal court. According to petitioner, the burden to establish competency should be on the State. The difficulty with this argument is that it ignores a clear principle of federal jurisprudence that a habeas corpus applicant always

has the burden of establishing that a state court conviction was obtained in violation of his constitutional rights, regardless of what the burden of proof would have been in the state court proceedings. See, e.g. Procunier v. Atchley, 400 U.S. 446, 451 (1971) ("Our decision make clear that [the habeas corpus applicant] must also show that his version of events if true, would require the conclusion that his confession was involuntary")' United States ex rel. Schuster v. Herold, 410 F 2d 1071, 1085 (2d Cir. 1969), cert. denied 396 U.S. 847 ("The burden of persuasion in federal habeas corpus is the usual civil one of a preponderance of evidence"). See also Nathaniel v. Estelle, 493 F 2d 794, 798 (5th Cir. 1974): "On remand the burden is on Nathaniel to prove his allegations and such proof should be clear and convincingly . . . If Nathaniel proves his incompetency, the court shall set aside the judgment of conviction and remand the case to the state courts for a new trial, at which time Nathaniel's mental capacity then to stand trial will be open to an adequate hearing."

In support of this it should be noted that in his opinion of Augut 23, 1973, Judge Lasker stated (A 266-267):

"During the course of consideration of the motion, Mayo's counsel has brought to our attention two New York

cases in support of his position:
People v. Bangert, 22 N Y (2d) 799
(1968), in which the Court of Appeals
held that where a sentencing judge
learned from a presentence report --
as was the case here -- that the
defendant has a prior history of
mental illness the court

"was bound to make some inquiry
into defendant's mental condition
at the time of sentencing, whether
or not counsel raised the issue."

And People v. Hudson, 19 N Y (2d) 137,
139 (1967) applying the Bangert rule
retroactively. No such inquiry was
made in Mayo's case at the time of
sentencing. The defendant does not
dispute the characterization of these
cases but answers that the remedy for
the failure to conduct the required
inquiry is to afford the defendant a
subsequent hearing on the issue, and
that Mayo was granted this right at
the Coram Nobis Hearing in 1967. Mayo
rejoins that the Coram Nobis Hearing
was not "full, fair and adequate"
within the meaning of 28 U.S.C. §2254
(d)(6). Whatever he merits of the
respective positions, a full, fair
and adequate hearing as to Mayo's
entire history of mental illness has
now been held in this court, thus
curing the failure to abide by the
rule of Bangert."

As stated by Judge Lasker in his December 1972

opinion

"There is, however, the public
interest in a limit to collateral
attacks on remote convictions. The

finality of criminal convictions
should not be lightly tampered with."

CONCLUSION

THE DECISION OF THE DISTRICT
COURT SHOULD BE AFFIRMED.

Dated: New York, New York
April 15, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CAROL DONOHUE , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 18th day of April , 1977, she served
the annexed upon the following named person :

JAMES B. KOBAK, JR., ESQ.
Attorney for Petitioner-Appellant
One Wall Street
New York, N. Y. 10005

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
18th day of April , 1977

Carol Donohue

Paul W. Gernaberry
Assistant Attorney General
of the State of New York